IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 59 OF 2006

M/s Armstrong Builders
and Developers, represented
by its Proprietor Mr. Savio
D'Cunha, residing at Shetye
Waddo, Mapusa, Bardez, Goa. ... Appellant

versus

Mr. Vishvanath Naik,
Shop No.11,
Kamath Cold Drinks,
K.T.C. Bus Stand,
Panaji, Goa. ... Respondent

Mr. J. A. Lobo, Advocate for the Appellant.

Ms. R. Kamath, Advocate for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 10TH NOVEMBER,2006.

ORAL JUDGMENT

This is a complainant's appeal against the acquittal of the accused under Section 138 of the Negotiable Instruments

Act, 1881(Act, for short).

2. The case of the complainant was that he was the Proprietor of Armstrong Builders and Developers and that on 22-1-2004 the accused had taken a cash loan from the complainant for a period of three months and in part discharge of the said liability the accused had issued a cheque bearing No. 112888 dated 22-4-2004 drawn on the Bicholim Urban Co-op. Bank Limited for a sum of Rupees One Lakh and when the cheque was presented for payment, the same was returned dishonoured with remark dated 2-7-2004 that the funds were insufficient. The complainant sent the notice dated 6-7-2004, which according to the complainant, the accused received on 7-7-2004 but failed to comply with the same within a period of fifteen days and therefore the complainant prosecuted the accused by filing the complaint on 20-8-2004.

3. In support of the complaint, the complainant examined himself and produced the necessary documents including the cheque, the memorandum of dishonour, copy of the registered notice along with the A.D.

4. The case of the accused in his statement recorded under Section 313 of the Code of Criminal Procedure, 1973 (Code, for short) was one of denial simpliciter so much so that when the accused when questioned as to whether he had anything to say regarding the case, the accused stated that he had nothing to say.

5. The learned J.M.F.C. by her Judgment/Order dated 28-4-2006 has acquitted the accused and this inspite of the fact that the law provides, in favour of the complainant, several presumptions including under Sections 118, 138 and 139 of the Act.

6. The learned Magistrate has come to the conclusion that the complaint filed on 20-8-2004 was filed after the expiry of one month since the statutory notice was received by the accused on 7-7-2004. There is no doubt that Section 142(b) of the Act provides that a complaint is required to be filed within one month of the date on which the cause of action arises under Clause(c) of the proviso to Section 138. It is now well settled that the cause of action arises not from the date of the notice

but from the date of the failure of the accused to make the payment as demanded. The accused was required to make the payment within fifteen days of the receipt of the notice. The notice was received on 7-7-2004. The cause of action would have arisen in favour of the complainant after expiry of fifteen days of 7-7-2004 and therefore it is but obvious that the complaint filed was within time. The learned Magistrate was wrong in acquitting the accused on that count.

7. As per the complainant, the notice was received by the accused on 7-7-2004. It appears that the complainant was cross-examined in relation to the signature seen on the A.D. card produced by the complainant and the complainant stated that the signature on the A.D. card and the signature on the cheque did not tally. This fact was presumably taken by the learned Magistrate against the case of the complainant observing that the complainant had not identified the signature on the A.D. card. It has been submitted on behalf of the accused, by Ms. R. Kamath, the learned Counsel, that in the absence of the complainant proving the signature on the A.D. card, no presumption of service is available in favour of the complainant.

There is no dispute that the statutory notice was sent by the complainant upon the correct address of the accused and was received at the given address. It is therefore very clear that once the notice was received at the address at which it was dispatched, the presumption under Section 27 of the General Clauses Act was clearly available in favour of the complainant. A similar situation was considered by the Apex Court in the case of **K. Bhaskaran** v. **Sankaran Vaidhyan Balan and another** ((1999) 7 SCC 510). The principle incorporated in Section 27 of the Act, observed the Supreme Court, can profitably be imported where the sender has dispatched the notice by post with the correct address written on it and then it can be deemed to have been served on the sender unless he proves that it was not really served and that he was not responsible for such non service. It was not for the complainant to prove that the signature on the A.D. card was not that of the complainant. On the contrary, it was for the accused to have proved that he had not received the said statutory notice. In this case, the accused did not even make an attempt to dislodge the presumption of service. Scribbling a signature different from his own could be a strategy adopted with a view to deny the signature. Mere suggestion that

the accused had not received the notice was not sufficient to displace the presumption. The accused chose not to examine himself nor the postman to prove the non receipt of the notice.

8. The complainant was also cross-examined on the aspect of money lending. In fact in the cross-examination of the complainant it was impliedly admitted that the amount which was advanced to the accused was not connected with the business of the accused, the complainant's business being that of a builder and developer. The complainant had categorically stated that he was not a money lender nor did he have license to lend money. Picking up the expression from para 3 of the complaint, that the complainant had given a loan to the accused, learned Counsel on behalf of the accused, submits that such a loan was not recoverable in the light of the provisions of the Goa Money Lender's Act, 2001. The learned Counsel on behalf of the accused has particularly referred to the expression activity in sub-clause (a) of Clause (l) of Section 2 of the said Act and has submitted that even a single loan would come within the purview of the expression "activity" appearing in the said sub-clause(a) of Clause(l) of Section 2 of the Act. Apart from the

denial by the complainant that he is the money lender, the accused produced no evidence to bring on record to show that the complainant was carrying on business of money lending or any activity of lending of any finance. The expression "activity" is not defined under the said Act and the ordinary dictionary meaning as per Black's Law Dictionary activity is an occupation or pursuit in which a person is active, and, as per Oxford English Dictionary, it is the condition in which things are happening or being done. In other words, the very subject of activity suggests continuity and therefore a single act of giving a loan would not come within the definition of sub clause(a) of clause(l) of Section 2 of the said Act. In this context, reference to the case of **Rotakonda Raghu Naidu** v. **Kolla S. Prasad**(2004 (4) Crimes 295) could be made. The learned Single Judge of the Andhra Pradesh High Court referring to another decision of the Division Bench of that Court observed that "money lender" envisages only those persons whose regular business is to advance monies and not those who advance monies casually. A solitary instance of giving a loan does not make a person a money lender. That being the position, the provisions of the Goa Money Lender's Act, 2001 would be of no assistance to the case

of the accused.

9. The complainant having examined himself in support of the case and having produced all the necessary documents, the learned J.M.F.C. ought to have considered the presumptions available in his favour as tantamounting to proof and in the light of the said presumptions ought to have held that the complainant had proved his case. The acquittal of the accused was not at all justified.

10. The appeal therefore succeeds. The Judgment/Order dated 28-4-2006 is hereby set aside. The accused is convicted under Section 138 of the Act.

11. By consent, for imposition of sentence S. O. to Wednesday, 15th instant.

N. A. BRITTO, J.

RD

DATE: 15.11.2006.

JUDGMENT CONTINUED

12. The accused has remained present along with his Advocate Shri Usgaonkar. Shri Usgaonkar has submitted that the accused is a paralytic person. It appears that he has some difficulty in talking. Learned Advocate Shri Lobo submits that the Complainant's interest is in recovering the amount due to the Complainant and the Complainant would not insist on the accused being imprisoned.

13. Considering the facts stated aforesaid, the accused is hereby sentenced under Section 138 of the Act to one day S.I. (till rising of the Court), which the accused shall undergo before this Court and to pay compensation of Rs.1,20,000/-, in default to undergo S.I. of six months. The accused is given time of eight weeks to pay the said compensation and upon failure, the accused should surrender before the learned J.M.F.C. to undergo the sentence in default of payment of Compensation.

N. A. BRITTO, J.

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